IT

IN THE HIGH COURT FOR ZAMBIA **2015/HP/0693**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JALISO BANJI **PLAINTIFF**

AND

CLEMENT TEMBO **DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiff : *In Person*
For the Defendant : *In Person*

J U D G M E N T

Cases referred to:

1. **Michael Chilufya Sata v. Zambia Bottlers Limited (2003) Z.R. 1.**
2. **Kabwe Transport Company v. Press Transport (1984) Z.R. 43.**
3. **Andrew Tony Mutale v. Crushed Stone Sales Limited (1994) Z.R. 98.**
4. **Attorney General v. Katwishi Kapandula (1988 - 1989) Z.R. 69.**
5. **Attorney General v. D.G. Mpundu (1984) Z.R. 6.**
6. **Philip Mhango v. Dorothy Ngulube and others (1983) Z.R. 61.**

Legislation and other work referred to:

1. **The Juvenile's Act, Chapter 53 of the Laws of Zambia.**
2. **Anthony M. Dugdale and Michael A. Jones (Eds), Clerk and Lindsel on Torts 19th Edition, (London, Sweet and Maxwell, 2006).**

By a writ of summons and statement of claim dated 12th May, 2015 the Plaintiff claims the following reliefs:

1. *Immediate payment of K31, 000.00 being costs of repairs of damaged motor vehicle Toyota Runx Registration Number ALG 3850 due to the negligence of the Defendant.*
2. *Damages arising from the loss of the use of the motor vehicle Toyota Runx whilst it was awaiting repairs.*
3. *Interest and costs there upon.*
4. *Any other relief the Court may deem fit.*

In the statement of claim, the Plaintiff averred as follows:

That on or about 18th February, 2014, he was driving from south direction to north direction driving a Toyota Runx Registration Number ALG 3850; that the Defendant was driving on Great East Road without regard for traffic and other road users from west and

east direction driving motor vehicle Mazda Registration Number ACL 9701.

He further averred that the Defendant suddenly failed to keep his rear side and went to hit into his motor vehicle thereby causing extensive damage and scratches to the right fender, inner cover depressed, damaged spring fender and front bumper. The total cost for the damages being K31, 000.00.

He further averred that on or about 4th May, 2015, a police report was given based on the events of what happened on 1st May, 2015 and the Defendant was found liable and charged for the offence of careless driving and subsequently fined; that after assessment of the damages on 6th May, 2015, three quotations were obtained for the Defendant to choose and pay for the expenses incurred as a result of the negligence. However the Defendant failed to pick a quotation and that he was not willing to pay the costs of the repair neither had he shown any remorse nor sought any other form of supplying compensation to him.

That as a result, his motor vehicle had not been operational rendering him to suffer loss and damages.

The Defendant's defence filed on 14th May, 2015 maybe summarized as follows:

That he never had any interaction with the Plaintiff in 2014 and that the Plaintiff's vehicle sustained not a very prominent scratch on the front fender which could only cost K400.00 or less for spray painting.

He also averred that the police report which was issued to the Plaintiff which he had sight of did not indicate any damage to the vehicle other than the scratched fender; that the police officers who inspected the vehicle namely Inspector Sishewa and Malambo would attest to that.

In relation to paragraph 6 of the statement of claim, the Defendant admitted the said paragraph only to the extent that he admitted the offence of careless driving and not what was being alleged by the Plaintiff; that the Plaintiff absconded to go to the police station when they were advised to produce the insurance documents and that he

only resurfaced when he was serving the Defendant with the summons on 12th May, 2015.

The Defendant also denied paragraphs 7 and 8 of the statement of claim as the damage on the vehicle needed no assessment because he saw the minor scratch which was on the vehicle. Furthermore, that the value of the Plaintiff's vehicle namely Toyota Runx was about K40, 000.00 and if the fender needed to be done, it would not have cost K31, 000.00. If that was the case, then the vehicle would have been a complete write-off.

At the hearing, the Plaintiff who was **PW1** aged 37 years old gave evidence on oath. He stated that he was parked at Engen Filing Station buying bread opposite Levy Mwanawasa Hospital.

After he bought the bread, he walked out and discovered that there was commotion around his vehicle Toyota Runx ALG 3850. When he walked to the vehicle, he found his colleague Chimwemwe Banda who was with some officers.

Chimwemwe told him that his vehicle had been bashed by a doctor by the name of Clement Tembo. When he was told this, he called Road and Traffic Safety Agency (RATSA) and the Police but they didn't show up in time. He then took a photograph of the Defendant's office Identification Card and the motor vehicle Registration Number; that the Defendant told him not to call RATSA and the police but that they should discuss the matter.

However, he insisted that it was a police matter and that the vehicle was comprehensively insured. He further told the Court that when he asked for the vehicle insurance, he told him that he didn't have.

Later he proceeded to Bennie Mwinga Police Post where the police confiscated the Defendant's driving licence. The Plaintiff further testified that a Mr. Sishewa instructed one of the officers to do the assessment of the vehicle and when that was done, the Defendant admitted the charge of careless driving and he paid K150.00.

After being issued with a police report, he took it to Madison Insurance along Independence Avenue. However, he was advised by a certain man at the insurance company that they could not proceed

to fix the vehicle without the Defendant's consent; that he was disappointed with the answer he was given and that is why he brought the matter to Court.

The Plaintiff testified that he was claiming damages as the person at the garage where he took the vehicle told him that the fender was damaged as well as the left stiffener; that he was also told that the entire vehicle had to be painted and not just the front bumper.

Therefore, he was claiming for K31, 000.00 being cost of repairs of the damaged motor vehicle due to the Defendant's negligent driving. He was also claiming for damages for loss of use of the motor vehicle whilst waiting for repairs; interest and costs.

When asked by the Court concerning the recorded conversation produced in the Compact Disc (CD), PW1 told the Court that the conversation was between him and the Defendant and also between the Defendant's witnesses and himself.

After the CD was played in Court, the Plaintiff told the Court that the first conversation was between him and the Defendant wherein the

Defendant offered him money. In the second CD, PW1 told the Court that the Defendant's witness was explaining to him that the Defendant had bashed his car. The name of the witness was Kafuti and the recording was done on 4th May, 2015 when he received the police report.

In cross examination, the witness told the Court that the second CD was recorded on 4th May, 2015 at Guard All offices along Alick Nkhata road; that it was not for him to come with the assessment on the amount to be paid but for the garage where the vehicle was supposed to be taken for repairs.

He further stated that the Defendant agreed that the vehicle was bashed that is why he mentioned that he wanted to give the Plaintiff K600.00 because the insurance had to take over as the vehicle was comprehensively insured.

In answer to a question why he mentioned that the Defendant drove the vehicle along Great East Road without due regard to other road users, the witness told the Court that the filling station were the vehicle was bashed from was along Great East Road; that the vehicle

was not moving but stationery as he had gone out to buy bread; that the Defendant bashed his vehicle on the front fender as he was looking for parking space. However, he could not tell the speed the Defendant was driving as he did not witness the incident.

He further explained that the Defendant's vehicle was not damaged because its high and he hit his vehicle with the rim and that's why he didn't see any paint or scratch on his vehicle.

The Plaintiff denied that he just wanted to get money from the Defendant because he was a medical doctor and added that as an engineer, he equally got a lot of money; that the garage where he took the vehicle did the assessment and arrived at the figure of K31, 000.00.

In answer to a question from the Court on the claim of K31, 000.00, the witness stated that he had no proof that he paid K31, 000.00 as he didn't have the receipt although he was claiming K31, 000.00; that he had no quotation for K31, 000.00 but K25, 520.00; that he was claiming for K31, 000.00 because of other expenses.

PW2 was **GEOFFREY KAPAMBA**, a Security Guard aged 47 years who resided at B14 Misisi compound in Lusaka.

He testified that on a date he could not recall, he was on duty when he was called by a woman who was in a vehicle who told him that someone driving a Mazda Grey in colour Registration Number ACL 9701 had bashed their vehicle. When he enquired who the owner of the vehicle was, he was told that it was Clement Tembo, the Defendant herein.

Later the owner of the vehicle which had been bashed came out from the shop and started discussing with the Defendant who told the owner that they should go to the ATM so that he could give him K500.00 to repair the vehicle. He left them discussing because he was called by his supervisor. To his knowledge, he thought the two had concluded the matter. He added that he didn't see the Defendant hit the Plaintiff's vehicle but he recalled that the owner told the Defendant that he would call RATSA as it was a police case.

In cross examination, he stated that he didn't see the impact on the fender but he saw that it had not come out but just moved.

There was no re-examination.

PW3 was **JASPER SINGANDU** aged 39 years old, a Security Guard who resided at House No. 316 John Laing compound.

His evidence was that he was working with his friend Kapamba, PW2 at the filing station when the incident occurred. However, he didn't see what had happened but after being called by his friend PW2, he found that a vehicle had been hit into and saw a depression on the number plate. When the owners of the vehicles came, they discussed and later they parted. He didn't know what happened after that as he was just called later that he had to attend court.

He added that he didn't hear the Defendant say that he didn't want the Plaintiff to involve the police.

In cross examination, he told the Court that the vehicle that was bashed had a number plate but he couldn't recall the number; that the dent was on the number plate.

There was no re-examination.

PW4 was **CHIMWEMWE BANDA**, a Computer Analyst at the Electoral Commission of Zambia (ECZ), aged 35 years old of House No. 206 Avondale, Lusaka.

She recalled that on 1st May, 2015, she went to Engen Filing Station to buy bread with her fiancé, the Plaintiff herein. He parked the vehicle in one of the parking slots and went inside to buy bread. She remained in the vehicle. Whilst waiting for him, she saw the Defendant's car, a Mazda hit the bumper in front although the Defendant did not realize it. So she rolled down the window and called for him since the Defendant's windows were closed. He therefore didn't hear her so she asked the security guards who were standing nearby to call him.

She later came out of the vehicle and followed the Defendant's car. She told the Defendant that he had hit into the Plaintiff's car and by that time, the Plaintiff had come out from the shop and found them talking.

She further stated that the Defendant refused to go to the police station because his job as a medical doctor didn't require him to go

to the police station; that he therefore told them that if it was possible, the matter should be settled without involving the police. However, she and the Plaintiff refused.

At this point, the Defendant's daughter ran to her and started pleading with them that her father had High Blood Pressure and so the matter should be settled without involving the police.

However, they proceeded to Bennie Mwinga Police Station but the Defendant refused to go with them. They were advised to go back the following day since it was late in the night.

The following day they went back to the police station but the Defendant refused to go with them. Later in the afternoon he went to the Police Station and met PW4 and the Plaintiff. The Plaintiff and the Defendant were taken to a certain room but she could not hear what was being discussed; that the Defendant denied that he had damaged the car. However, he was charged with careless driving and he paid.

The witness further told the Court that the Plaintiff and the Defendant failed to reach an agreement on the repair of the vehicle. This is what made the Plaintiff commence the matter in court.

In cross examination, she told the Court that the Defendant was coming from the East and got on the pavement and hit the vehicle on the front part; that she heard the impact and the Defendant went and parked in the slots near the shops.

She denied that the Defendant just bypassed the vehicle; that when the matter was reported at the police station she informed the police that the Defendant hit the vehicle on the bumper and that he agreed that he had hit the vehicle. She denied that she told the police that it was a hit and run.

That was the end of the cross examination. The witness was not re-examined.

This marked the close of the Plaintiff's case.

The Defendant **CLEMENT TEMBO** aged fifty one (51) years old, a Medical Doctor at Levy Mwanawasa Hospital was **DW1**. He told the

Court that it was around 20:00 hours when he decided to go to Stalilo to buy units for electricity. He was with his daughter and so they proceeded to Engen Filling Station using the back side road which runs parallel to Great East Road. He bypassed the vehicle which was in the first slot and he never hit the pavement because he would have gone into the ditch. He then went to park on the other side opposite the shopping mall.

Immediately he parked, a small boy ran to him and told him that a lady being PW4 was saying that he had bashed her car; that he was surprised because he never hit any pavement or anything at all and so they started arguing. Shortly thereafter, Mr. Jaliso, the Plaintiff appeared and he was shouting RATSA RATSA and he started asking for his driver's licence; that it was a tensed up environment. He obliged and showed him the licence because at that time he thought he was a RATSA officer. He added that he also asked for other documents and he showed him the Levy Mwanawasa badge which hang in his vehicle.

The Defendant further told the Court that he told the Plaintiff that if had hit into his vehicle, he would have felt it as he had been driving since 1993 and that if there was any problem, he could contact him using the contact details on the documents he had given him.

The Plaintiff then left him whilst shouting through the window that he should prepare a bill. The following day, the Plaintiff called to tell him that he was going to the garage but he told him that his vehicle had no scratch. However the Plaintiff insisted and went to the police station and made a report to Ms. Pobonga. Later he got a call from Ms. Pobonga but he told her that he couldn't make it since he was on duty at the hospital and that he would go there at lunch time. When he went to the police station, he found the Plaintiff, PW4 and a young female police officer waiting for him. The officer inspected their vehicles but advised them that she could not handle the case but maybe a senior police officer. However, she got his driver's licence as well as the Plaintiff's and told them to go back on Monday.

On Monday, they found Mr. Malamba who referred them to Mr. Seshewa. That they started arguing again at the police station as PW4

started saying that it was the tyre which scratched the vehicle; that PW4 was very argumentative but he insisted that if he had hit the vehicle he would have hit it on the left and not on the right as the scratch was on the right.

That Mr. Malamba then stated that since they were not getting anywhere, he should just admit so that the case could be closed. He followed what Mr. Malamba told him and that is how they shook hands with the Plaintiff and they parted.

On 6th May, 2015, he got a call from the Plaintiff and asked him to go to the insurance company to sign papers; that he was surprised because he told him that he had comprehensive insurance as he had submitted the same at the police station. So he rang Mr. Malamba and told him that the Plaintiff wanted him to go to the insurance company to sign papers. He was advised not to go by Mr. Malamba but to go to the police station as he was not going to know what he was signing for. He therefore told the Plaintiff to take the papers to the police station so that he could sign them at the police station. He stated that he delayed to go and so he found that the Plaintiff had

left. He was told by Mr. Malamba that the Plaintiff was mad as he had brought a quotation of K 11,000.00. From there he tried to call the Plaintiff but he didn't answer. Later he just received summons from court which contained allegations contrary to what had transpired.

The Defendant told the Court that the Plaintiff had been changing statements and it made him wonder what he wanted. He stated that the Plaintiff's vehicle was stationary and if he could cause such damage to his vehicle, then it meant that he was driving from the filling station. He therefore denied that he hit the Plaintiff's vehicle as he just bypassed it and PW4 stated that it was the tyre that scratched the vehicle. He also added that the police report in the Plaintiff's bundle of documents showed that it was a scratched front bumper and this was contrary to what was contained in paragraph 5 of the Plaintiff's statement of claim.

The Defendant further stated that the Plaintiff gave a statement that he was driving from North to South and the Defendant from West to East. That with this statement, it meant that the two vehicles were

in motion. However, his statement was contrary to what PW4 told the Court that the Plaintiff's vehicle was stationary. He also added that the Stalilo road was bumpy and therefore, it was not possible to cause such damage to the vehicle because one could not drive at a high speed.

The Defendant also told the Court that from the police report his vehicle didn't have any damages and if they had to go by what the witnesses had said, his vehicle would have been damaged if it had caused that kind of impact to the Plaintiff's vehicle. He added that a scratch was a small erosion and not a depression.

After watching the recorded video, the Defendant told the Court that the vehicle was not his as the corner to the vehicle was not like that and that the grill of the vehicle was solid but on his vehicle it was meshed. He also told the Court that there were no damages to the Plaintiff's vehicle as it only had scratches which could not even amount to K400.00. He stated that the security guards did not see anything.

In cross examination, he stated that the Plaintiff called him so that he could come and claim insurance. That the police officer told him to admit the charge so that the case could be closed; that he was just trying to help them. He stated that he agreed to sign because the Plaintiff had persisted and so he wanted to shake him off. So he signed not because he was guilty of the charge. The Defendant denied that he had bashed the Plaintiff's bumper as he had just bypassed the vehicle.

DW2 was **BERNARD KAFUTI**, a security guard at Armguard aged 29 years. He recalled that on 1st May, 2015, he was at Engen filling station near Chainama when he saw the Plaintiff come with a certain lady. They parked near his vehicle and the Plaintiff went inside the shop. A few minutes later, he saw a Mazda vehicle coming from Don Gordon road and the driver parked facing the shop. Within a short while, he saw a lady come out of the first vehicle and she shouted that the driver of the Mazda had been bashed. He stated that he was near but didn't hear or see the Mazda bash the other vehicle. When the lady was shouting, the Plaintiff had gone out to buy electricity

units in the shop. Then he saw him come out and he started shouting RATSA RATSA.

Later, he saw the Defendant also come out of the shop and the Plaintiff followed him and told him that he had bashed his car. They started discussing and the Defendant gave the Plaintiff his particulars. The witness told the Court that he tried to see where the vehicle had been bashed but he couldn't see it as the Plaintiff was saying that the fender had come out. However, it had not come out.

From there he asked the Plaintiff to call the police to assist with the problem. He refused and stated that his vehicle was insured and that whoever had bashed it would pay. After arguing for some time, they all left.

When cross examined by the Plaintiff, he denied that he told his supervisor that the Defendant had bashed his vehicle. When the Plaintiff referred him to a recorded video, DW2 denied that he was the one in the video.

There was no re-examination.

AMOS SAKALA, a driver who resides at B3/30/29 Kalingalinga compound was **DW3**. He told the Court that on 1st May, 2015 around 19:20 hours, he was parked at Engen filling station facing southern direction. After that, the Plaintiff came and parked in the first parking slot on the left. He was with a lady; he came out and went inside the shop. Shortly thereafter, the Defendant drove to the filling station from the northern direction and by passed the left hand side of the Plaintiff's vehicle. He parked in the eastern direction. The lady who was with the Plaintiff then called a certain man who had gone to the filling station to buy fuel and asked him to call the Defendant as he had hit into their vehicle. He then saw the Plaintiff come out of the shop and started talking on the phone saying RATSA RATSA.

Thereafter the lady who was with the Plaintiff told him that the vehicle had been hit on the right side. After that they started discussing and he left the scene and went to Chelstone AB Bank.

He stated that he didn't see the Defendant's vehicle hit the Plaintiff's vehicle and that it was not possible that the Defendant could have hit the vehicle on the right side or even the front considering the

direction he was coming from. He also told the Court that he didn't see any damage on the Plaintiff's vehicle.

In cross examination by the Plaintiff, the witness was referred to a sketch map drawn by the Defendant. He stated that the Plaintiff was parked in the first slot whilst he had parked in the second slot; that the security vehicle had no permanent slot since it was a rapid response vehicle. He further stated that he was not there when the Defendant told the Court that they should just agree.

There was no re-examination.

The last witness for the Defendant **DW4** was **BLESSINGS THOKOZILE TEMBO,** the Defendant's daughter aged 12 years old. After conducting a voire dire in accordance with Section 122 of the Juveniles Act, I was satisfied that the juvenile was possessed of sufficient knowledge to give evidence and understood the importance of telling the truth. She therefore gave evidence on oath.

She told the Court that on 1st May, 2015 she went with her dad to buy units for electricity at Engen filling station; they used the back

entrance. When referred to the Defendant's bundle of documents, she stated the Plaintiff's vehicle was parked in the first slot and they went and parked facing the shop.

Then a woman who was in the Plaintiff's vehicle told a certain man to tell her dad that he had bashed into the Plaintiff's car. So they came out of the vehicle but the Plaintiff was not in his vehicle as he was in the shop.

Thereafter her dad went to speak to the woman and later the Plaintiff came out of the shop and the three started talking. She also approached them and as a caring child, she told them that her dad was a hypertensive patient. After the discussions, they all left.

In cross examination, she told the Court that the vehicle that her dad bashed was blue in colour; that she didn't recall that her dad had told the Plaintiff not to call the police but that they should just settle the matter.

In re-examination, she told the Court that she didn't see any damage to the Plaintiff's vehicle as there was no scratch on the vehicle.

In answer to a clarification from the Court whether she saw her dad bash the Plaintiff's vehicle, she answered in the negative.

In view of the answer given, both parties were asked by the Court if they had any questions for the witness.

In response to a question from the Plaintiff, who asked her what colour the vehicle which her dad bashed was, she stated that her dad didn't bash any car.

The Defendant didn't ask any question and he closed his case.

The parties filed written submissions which I have carefully considered when arriving at this decision. However, I should mention that the Defendant attached pictures to his submissions which I have not considered as evidence cannot be adduced through submissions and when the case has been closed. This is highly irregular and offends the rules of evidence.

As I have already alluded to, the Plaintiff claims immediate payment of K31, 000.00 being the cost of repairs to the damaged motor vehicle Toyota Runx Reg. No. 3850 due to the Defendant's negligence.

From the evidence on record, it is not in dispute that the Defendant on the material day was driving a motor vehicle Mazda Reg. No. ACL 9701 when he went to buy Zesco electricity units at Engen filling station along Great East Road. It is also not in dispute that the Plaintiff is the owner of the motor vehicle Reg. No. 3850 which was parked at Engen Filling Station on the material day.

The issue however which I have to resolve is whether the Defendant negligently drove his vehicle and hit into the Plaintiff's vehicle which resulted into damages on the front fender, inner cover, spring fender and front bumper.

I should state from the outset that the standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probabilities "as opposed to beyond all reasonable doubt in a criminal case". The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probabilities that the other party is liable.

In these proceedings, the Plaintiff has alleged negligence against the Defendant as the cause of the damages to his motor vehicle. It is

therefore, his duty to prove that the Defendant was negligent for his claims to succeed on a balance of probabilities.

According to the learned author of Clerk and Lindsell on Tort, there are four requirements of the tort of negligence. These are:

> **(i) The existence in law of a duty of care;**
> **(ii) Breach of the duty of care by the defendant;**
> **(iii) Causal connection between the defendant's careless conduct and the damage; and**
> **(iv) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."**

According the learned authors, when these four requirements are satisfied, the defendant is liable in negligence.

In the case at hand, there is no doubt that the Defendant being a driver of the motor vehicle Reg. No. ACL 9701 was under a legal duty towards the Plaintiff and other road users when driving the said vehicle.

The question that begs an answer is whether on the evidence adduced, the Defendant breached that duty by hitting into the Plaintiff's vehicle resulting into the damages to the vehicle as indicated in the statement of claim. This proof of damage is important because the Supreme Court in the case of **Michael Chilufya Sata v. Zambia Bottlers Limited** [1] stated that:

> **"Negligence is only actionable if actual damage is proved....Negligence alone does not give a cause of action, damage alone does not give a cause of action, and the two must co-exist."**

It is not in dispute that when the Defendant drove to the Engen filling station, the Plaintiff was inside the shop and therefore he did not see the Defendant as he drove in. However, the Plaintiff in his evidence also placed reliance on the admission of guilty made by the Defendant in order to establish liability. Although that evidence is on record, I have attached no weight to it on the authority of the celebrated case of **Kabwe Transport Company v. Press Transport**[2] where the Supreme Court stated that there is no provision for

convictions in criminal trial to be referred to and taken note of in a civil trial.

PW2 also didn't see the Defendant as he told the Court that he was just told by PW4 that the person who was driving the Mazda had bashed into their vehicle. In the same vein, PW3 didn't see what had happened. After he was called by PW2, he went to the scene and found that the motor vehicle in issue had a depression on the number plate.

Therefore the only witness who speaks to the alleged breach is PW4. She stated that she was with PW1 when they went to Engen filling station to buy bread; that PW1 parked in one of the parking slots and went out of the vehicle to buy bread. She remained in the vehicle waiting for PW1 to come back. That whilst waiting for him, she saw a motor vehicle driven by the Defendant hit the bumper in front of the vehicle although the Defendant didn't realize it. So she called out for him since his windows were closed.

The Defendant in his Defence and evidence in Court denied that he hit into the Plaintiff's vehicle. He stated that when he went to Engen

filling station, he by passed the vehicle which was in the first slot and never hit the pavement because he would have gone into the ditch. That he was surprised when he was informed that he had hit into a vehicle. The Defendant's witnesses also denied having seen the Defendant hit into the Plaintiff's vehicle. DW2 a security guard who was parked at Engen filling station told the Court that he just saw a lady come out of the vehicle shouting that the Defendant had hit into their vehicle.

DW3 another security guard also stated that he didn't see the Defendant's vehicle hit the Plaintiff's. Equally, DW4, the Defendant's daughter who was with her father also contradicted herself in her evidence. In examination in chief she stated that the vehicle that her father bashed was blue but in re-examination, she changed and stated that her father didn't bash any vehicle.

What the foregoing means is that there is only one person, PW4 who stated that the Defendant hit into the Plaintiff's vehicle. The question I ask myself is whether there is any other evidence that supports the assertion by the Plaintiff that the Defendant hit into his vehicle?

The Plaintiff at page 1 of his bundle of documents produced a Zambia Police Traffic Accident Report. This report shows that the front bumper of motor vehicle ALG 3850 was scratched. PW4 in her evidence told the Court that the Defendant hit the front bumper of their vehicle which was parked in the first parking slot.

The inference I can draw from the evidence of PW4 and the police report is that since the Plaintiff's vehicle was parked in the first parking slot and the Defendant admits that he bypassed the vehicle which was in the first parking slot, is that the Defendant is the one who hit into this vehicle which resulted into the front bumper being scratched as indicated in the police report. I have accepted the evidence of PW4 because the windows of the vehicle which the Defendant was driving were closed and it is possible that he could not have heard that he had actually hit into the Plaintiff's vehicle.

In this regard I find that the Defendant who owed a duty of care as driver to other road users including the Plaintiff, breached that duty of care as he failed to keep to his side and hit into the Plaintiff's vehicle.

The next question to be determined is whether the breach resulted into damage to the vehicle and that the actual loss suffered was K31, 000.00.

The Plaintiff in his statement of claim asserts that extensive damage and scratches were caused to the right fender, inner cover, spring fender and front bumper.

In his evidence, the Plaintiff did not mention the damages to the vehicle but stated that he was told by the person at the garage where he took the vehicle that the fender was damaged as well as the left stiffener. This evidence is hearsay and it is inadmissible.

PW2 told the Court that he didn't see the impact on the fender but saw that it had not come out. It had just moved. PW3 stated that the dent was on the number plate. The damages indicated on the police report which I have already alluded to are that the front bumper was scratched. This is consistent with the PW4's evidence who stated that she saw the Defendant hit the front bumper.

I have also noted that while the Defendant denied that he hit into the Plaintiff, he pleaded in paragraph 6 of his Defence that what was spotted was a minor scratch.

While the Plaintiff in his statement of claim has averred that the Defendant caused extensive damage and scratches to the right fender, I find that the damages caused to the motor vehicle Reg. No. ALG 3850 were scratches to the front bumper.

Now what was the actual loss suffered by the Plaintiff? To support that he is entitled to the amount of K31, 000.00 as costs for the repair of the vehicle, the Plaintiff produced in Court a quotation of the repair details from Metallic Motors which is at page 2 of the Plaintiff's bundle of documents. It shows an amount of K25, 520.00.

According to the Plaintiff, he has made a demand of K31, 000.00 which is the amount that he paid on 10th May, 2015 for the cost of the repairs to the damaged vehicle.

For all intents and purposes, what the Plaintiff has pleaded are special damages being costs of repairs of the damaged vehicle.

Special damages are awarded to compensate for actual out of pocket expenses that a claimant has incurred as a direct result of the defendant's actions or behaviour. Apart from repair or replacement of damaged vehicle, special damages also include short term medical expenses, loss of earning capacity, loss of income or business or transportation costs. The aim for these special damages is to put the claimant back in the financial position he would have been in had the accident not occurred.

In terms of proof, the claim for special damages must be proved with compelling evidence. Thus the Supreme Court in the case of **Tony Mutale v. Crushed Stone Sales Limited**[3] held that:

> **"There is need for satisfactory proof to be provided before special damages can be awarded by the court."**

In the present case, the Plaintiff admitted in his evidence when asked by the Court that he only produced a quotation from Metallic Motors in the amount of K25, 520.00 to support this claim and not the receipt for the payment he had made. However, the Supreme Court

in the case of **Attorney General v. Katwishi Kapandula** [4] stated that:

> **"This Court has on many occasions indicated that, in claims for special damages, either documentary or independent evidence should be called in support. By this we mean that, if money is actually paid out by the plaintiff, evidence of such payment should be placed before the Court, and in other cases evidence from someone familiar with the cost of whatever is claimed should be available." (Underlying mine for emphasis only.)**

The Plaintiff also admitted that he did not have a quotation for K31, 000.00 but that this amount included other expenses which he had not produced before Court.

Based on the foregoing authority, it was incumbent upon the Plaintiff to have produced before Court the invoice showing the actual amount paid for the repairs considering that the Defendant in paragraph 6 of the defence denied that the damage caused to the vehicle could cost K31, 000.00 as the vehicle was not a complete write-off. Furthermore,

the quotation is not sufficient proof that he paid the amount on the quotation.

In addition, the Plaintiff should have adduced before Court the other expenses he incurred as alleged since the demand is for K31, 000.00 but the quotation is for K25, 520.00.

In the absence of any sufficient evidence to prove that the Plaintiff's vehicle was repaired and that he incurred K31, 000.00 as costs for repairs of the scratches to the vehicle, I find that this claim is speculative and it fails.

In relation to the claim for damages arising from loss of use of the motor vehicle whilst it was awaiting repairs, as I have mentioned, these are also special damages.

To further illustrate on the pleadings and proof of these damages, the Supreme Court in the case of **Attorney General v. D.G. Mpundu** [5] stated that:

> **"Special damages, on the other hand, is such loss as the law will not presume to be the consequence of the**

defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. (Underlining mine for emphasis only).

Similarly, in the case of **Philip Mhango v. Dorothy Ngulube and others**[6] the Supreme Court stated that the level of proof required for the claimant to succeed in a claim for special damages is evidence which brings certainty in order for the court to arrive at a fair assessment.

Although the Plaintiff has pleaded loss of use of motor vehicle, he has not proved by evidence both that loss was incurred when the vehicle was being repaired and that this loss was a direct consequence of the Defendant's conduct. In other words, the Plaintiff has not adduced evidence which brings certainty to support this claim in terms of the period and how much he spent whilst the vehicle was being repaired.

For these reasons, I find that the Plaintiff has failed to prove this claim. It also fails.

The net result of my findings is that the Plaintiff has failed to prove the extent of the actual loss suffered. As I mentioned, the onus was on the Plaintiff to prove his case based on the reliefs sought being the cost of the repairs to his vehicle and loss of use of vehicle.

In this regard, I hold that the Plaintiff has failed to prove his case on a balance of probabilities that he is entitled to payment for the cost of the repairs of the damages caused to his vehicle and also loss of use of motor vehicle. The Plaintiff's claims are hereby dismissed. Considering the circumstances of the case, I make no order as to costs.

Leave to appeal granted.

DELIVERED AT LUSAKA THIS 30th DAY OF JUNE, 2020.

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M.C. KOMBE

JUDGE